



CHAIR ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ATTACHMENT A

CHAIR ELLEN L. WEINTRAUB'S
SUPPLEMENTARY RESPONSES TO QUESTIONS FROM THE
COMMITTEE ON HOUSE ADMINISTRATION
MAY 1, 2019

The Commission greatly benefits from effective Congressional oversight, and I am pleased to see that the Committee is zeroing in on some of the most salient issues before my agency.

Several of the Commission's responses merit additional comment.

Questions 12 & 13: *Has the Commission established an "action plan" regarding low employee morale? How is the Commission addressing the root causes of low employee morale?*

The Commission is concerned about low employee morale and has taken the actions described in Answers 12 and 13 to address it.

But there is a larger driver of low employee morale, especially among the professionals in our Office of General Counsel. Staff work many long hours on enforcement matters or rulemakings, only to see enforcement of their matters blocked, or their policy work discarded, by half the Commission. This is a morale-killing problem that will persist as long as the Federal Election Commission lacks a majority of members who are committed to robust law enforcement and effective policymaking.

Questions 17(c) & (d): *How does the Commission plan to address the hundreds of cases on its enforcement docket? How often does the Commission plan to meet for the remainder of 2019 in Executive Session to dispose of these cases?*

I have proposed an aggressive meeting schedule for the second half of 2019 that would have the Commission meeting in Executive Session virtually every week. This would almost double the ordinary Executive Session meeting schedule for the rest of the year. At the Commission's next Public Session, on May 9, I will put a schedule forward for a vote.

Meeting to vote on matters is only part of the solution; if we do not have enough Enforcement Division staff to process our caseload, we will never make progress in clearing our docket. We are not only *not* making progress on staffing levels, we are falling further behind. As shown in Figure 1, below, while Enforcement Division staff FTEs have dropped 30% from 59 to 41 since 2010, the number of enforcement cases has more than tripled. As a result, in 2010, our Enforcement Division staff had 1.8 cases per FTE; in 2018, it was 8.

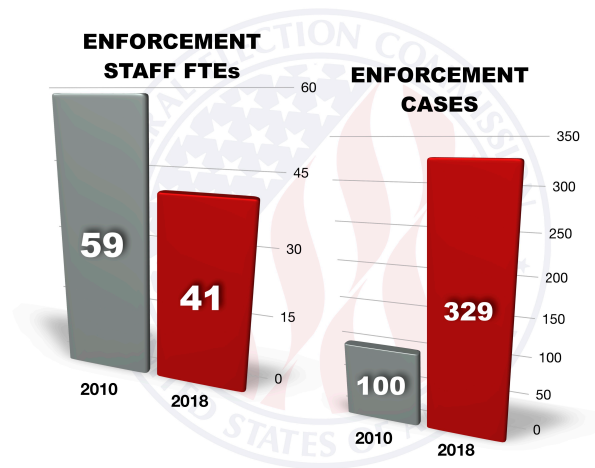


Fig. 1: Enforcement staffing and caseload

This atrophy of the FEC’s Enforcement Division staffing levels has stemmed from (a) a refusal of my colleagues to ask Congress to provide funds for more Enforcement Division staff and (b) systematically blocking, slow-walking, or ignoring requests from Enforcement Division leadership to fill vacancies.

Question 18: *How many Matters Under Review are considered in a typical Executive Session?*

It depends on the year. The consensus answer is correct when it states that from 2015 through the present, the Commission considers an average of approximately 18 enforcement cases per Executive Session. But this average varies widely, and can be correlated to the affiliation of that year’s Commission chair:

Calendar Year	Average Number of MURs per Agenda	Chair Affiliation
2015	22.2	D
2016	12.4	R
2017	20.7	I
2018	17.3	R
2019	27.5	D
Total	18.6	

Republican chairs average 14.9 matters per Executive Session agenda; Democratic and Independent chairs average 23.5 – 58% more.

Question 20: *Why are some enforcement cases held over – sometimes for years – without resolution?*

The Commission’s consensus answer to this question contains a laundry list of reasons commissioners give for holding over cases. In practice, some of these reasons have been misused to improperly delay or deny justice on some very important matters.

For example, it may occasionally be a good idea to hold matters over “pending completion of General Counsel’s Reports in, or Commission consideration of, other matters that involve common respondents or common legal issues.” But when my colleagues applied that reasoning to their treatment of several LLC matters, this turned into years of delay, with the clock starting over entirely every time a new complaint was filed. As my colleague Ann M. Ravel and I wrote in 2016:

Having refused to consider the first three matters without any justification for several years, they used the filing of the final case as pretext to further delay all of the matters. After stalling on the oldest of these cases for 1,357 days, they ultimately voted against opening an investigation or engaging in conciliation in every one of them. We twice tried to force a vote on the long-pending matters only to have all three Republican commissioners abstain on the motions. When they did finally agree to consider the matters earlier this year – and the Commission deadlocked on the votes along party lines – we even offered to forego all penalties in the hope of persuading them to at least acknowledge these clear violations of the law. But even that was a bridge too far for them.¹

The Commission has no procedural tools available to those who seek to resolve matters in a timely fashion, but commissioners who want to delay matters can do so endlessly. At the moment, with just four commissioners in the Commission’s six slots, a single commissioner’s objection can hold over an item repeatedly; if the item is forced onto an agenda, all that commissioner has to do is abstain from voting to delay consideration of the matter. But it works when the Commission is at full strength as well; when the Republican commissioners abstain, they act as their usual bloc.

¹ Statement of Commissioners Ann M. Ravel and Ellen L. Weintraub (April 13, 2016) in MURS 6487 & 6488 (F8, LLC, *et al.*), MUR 6486 (W Spann LLC, *et al.*), MUR 6711 (Specialty Investment Group, Inc., *et al.*), and MUR 6930 (Prakazrel “Pras” Michel, *et al.*), found at <https://eqs.fec.gov/eqsdocsMUR/16044392258.pdf>.

Questions 27 & 28: *Regarding split votes.*

We find majorities to dismiss complaints against those who have not broken the law, which is good, but hardly noteworthy. But we are also supposed to find majorities to enforce against those who have, and we are failing to do so.

What my Republican colleagues are reflexively unwilling to do is move forward on cases where our Office of General Counsel recommends finding reason to believe a violation of the law may have occurred. Sixteen percent of MURs considered in Executive Session deadlock entirely. Those cases are then closed. But a slim majority of 51% have at least one split vote along the way. Inside that latter number is where a lot of the Commission's non-enforcement of the law happens.

Frequently, my Republican colleagues will vote down OGC's recommendations, refuse to move forward on the most major violations alleged, approve going forward on a much more minor accusation, and slash penalties far below appropriate levels – even on penalties set by statute or official Commission policy. My only choices are to accede to their tactics or to vote to dismiss the matter altogether. I'm lucky to get half a loaf; I may just get a slice; frequently, I'm not even offered crumbs.

The ratchet only goes one way. There is no leverage – ever – for anyone who wants to vigorously enforce the law. The advantage always falls to those who want to do less.

Question 29: *Once the Commission deadlocks on a recommendation from the Office of General Counsel, is it the Commission's position that the Office of General Counsel should not make the same recommendation in an analogous case?*

It would be improper as a matter of law and of parliamentary procedure for the Office of General Counsel to take any direction whatsoever from such a Commission deadlock. In the FEC's enforcement context, the Commission deadlocks on an OGC recommendation when a motion on that recommendation has failed to receive the required four affirmative votes. It is a motion that has failed. When a motion fails, the Commission has not acted.

A deadlocked vote is a disagreement, not a decision.

Question 30: *Since the Supreme Court's decision in Citizens United, how many times has the Commission found a violation of the coordination regulations?*

The simple answer is **zero**.

Even in a pre-*Citizens-United* world, coordination was difficult to prove. Post-*Citizens United*, the larger stakes involved in the limitless amounts super PACs are allowed to

spend has caused the political community to push the boundaries even further, and the Commission's coordination regulations have failed altogether.

The Commission has been blocked from even investigating coordination when close family members, close friends, or former staffers of candidates start up super PACs that benefit those candidates. The Commission has been blocked from even investigating coordination when super PACs republish a campaign's materials. The Commission has been blocked from even investigating coordination when a candidate has a website page spelling out exactly what they wanted 'their' super PACs to do.

Despite the enormous pressure placed on the coordination regulations by *Citizens United* and super PACs, the FEC's Republican commissioners have blocked the agency from even *beginning* a rulemaking that would explore whether stronger rules are needed post-*Citizens United*. They are. Badly.

Question 33: *How many rulemakings has the Commission completed since January 1, 2012, excluding Civil Monetary Penalties Inflation Adjustments?*

The Commission's rulemaking pace has slowed drastically since 2008.

One significant example: Beginning shortly after the *Citizens United* decision upended the U.S. campaign-finance system in 2010, I have tried repeatedly – solely or in combination with colleagues – to initiate rulemakings that would protect U.S. elections from foreign spending. Some of these efforts focused on the various ways foreigners might seek to route money through various for-profit and nonprofit corporate entities. Most recently, in May 2018, I re-introduced a bare-bones proposal to prevent spending by corporations owned, or controlled, or used as conduits by *foreign governments*. Every one of these rulemaking proposals was blocked from going forward.²

² See FEC open meeting minutes (Jan. 20, 2011), at 4, http://www.fec.gov/agenda/2011/approved2011_06.pdf; "Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations" (Jan. 20, 2011), http://www.fec.gov/agenda/2011/mtgdoc_1102.pdf; Ann M. Ravel, Ellen L. Weintraub, Petition for Rulemaking (June 8, 2015), https://www.fec.gov/resources/about-fec/commissioners/statements/Petition_for_Rulemaking.pdf; "Proposal to launch rulemaking to ensure that U.S. political spending is free from foreign influence" (Sept. 9, 2016), https://www.fec.gov/resources/about-fec/commissioners/weintraub/statements/Weintraub-Foreign_Political_Spending_Rulemaking.pdf; FEC open meeting minutes (Sept. 15, 2016), at 12, https://www.fec.gov/resources/updates/agendas/2016/approved_16-63-a.pdf; "Revised Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence" (Sept. 28, 2016), https://www.fec.gov/resources/about-fec/commissioners/weintraub/statements/Foreign_National_2_Memo_28_Sept_2016.pdf; FEC open meeting minutes (Sept. 29, 2016), at 11, http://www.fec.gov/agenda/2016/documents/approved_16-64-a.pdf; FEC open meeting minutes (Jan. 12, 2017), at 7, https://www.fec.gov/documents/372/January_12_2017_Open_Meeting.pdf; "Rulemaking proposal to combat foreign influence in U.S. elections" (May 17, 2018), https://www.fec.gov/documents/556/mtgdoc_18-26-a.pdf. See also FEC open meeting minutes (May 24, 2018), at 14, https://www.fec.gov/resources/cms-content/documents/May_24_2018_Open_Meeting.pdf.

Question 37: *What further action does the Commission anticipate taking on REG 2011-02 concerning internet communication disclaimers? When does it anticipate taking this further action, if any?*

I remain hopeful that we can come to consensus on this rulemaking and promulgate a new rule. Updating our advertising disclaimers for the internet age is long overdue. This rulemaking was pending on the Commission's agenda long before we learned that hostile foreign governments were using internet advertising to interfere in our elections.

It is, simultaneously, (a) one of the most modest steps we could take to increase transparency in internet advertising and protect our elections from undue influence and (b) the largest step I could get my colleagues to even *consider* taking.

That the rulemaking effort has floundered as long as it has – I have been unable to extract a response from my colleagues more than six months after giving them my latest draft – is emblematic of the challenges facing any FEC rulemaking effort. Again, there is simply no leverage available to those who would like to move efforts forward. Those who would block progress have all the leverage.

Question 38: *How many litigation cases has the Commission appealed in the past 10 years after an adverse court ruling?*

The simple answer is **zero**.

Question 41: *Prioritizing matters involving allegations of foreign influence.*

The Commission's staff has indeed prioritized their handling of foreign-influence matters, and, as Chair, I have placed these matters on Executive Session agendas in a timely fashion. I can bring commissioners to the table on these matters, but I cannot make them vote. Several foreign-influence enforcement matters have been held up repeatedly this year; one statute-of-limitations-imperiled matter has been on the agenda of every Executive Session this calendar year, and my colleagues have refused to vote on it.

Question 46: *What are the greatest challenges to the Commission's ability to fulfill its mission and mandate?*

For the past 11 years, the Federal Election Commission has been severely challenged from the inside by a group of commissioners who harbor ideological opposition to the very nature of the agency and the law we are charged with enforcing. FECA's requirement that it takes four votes to form a majority on the six-member commission

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Supplementary Responses
May 1, 2019

was intended to ensure that Commissioners of one party could not persecute members of the other party. And it succeeded in providing that protection.

But the Commission's structure left it vulnerable to a bad-faith strategy where one party's commissioners routinely vote in a bloc, giving them the ability to block any matter before the agency. Unfortunately, my Republican colleagues have pursued this strategy consistently since 2008. We are rarely able to find four votes to pursue most matters of any substance. We are unable to find four votes to pass regulations to respond to the vast changes in the campaign-finance landscape over the past 11 years, especially since *Citizens United*.

And within the agency, my colleagues' obstruction has left the Commission and the country less well-prepared to handle the issues that do come before us. As noted above in the answers to questions 17(c) & (d), my colleagues' actions have caused our Enforcement Division staffing levels to atrophy.

As a result, the Federal Election Commission has been tethered to the sidelines as super PACs and dark money have exploded across the American political scene, as our elections have been attacked by our chief foreign adversary, and as Americans' faith in their democracy has declined.



Ellen L. Weintraub
Chair